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Cover Page Footnote

The author would like to thank Renee C. Fox for her work on an earlier version of this paper. I am grateful to Willy DeCraemer, Stephen Masciocchi, and Robert Nelson for their helpful comments and criticism.

AMBIVALENCE, CONTRADICTION, AND AMBIGUITY: THE EVERYDAY ETHICS OF DEFENSE LITIGATORS*

*Carla Messikomer***

INTRODUCTION

OUR work was undertaken during a time of major change in the American legal profession. Prominent among the new developments it is facing are: (1) the oversupply of lawyers, combined with the escalating size of large law firms, and the greater diversity in the social backgrounds of their members; (2) the infiltration of a big business ethos into the traditional professional culture of the large elite law firm; (3) the increasing mobility of lawyers between firms, accompanied by an intensified competitiveness between them for clients and revenues; and (4) the emergence of new questions about the identity of the client and the shifting power structure in the lawyer-client relationship.

These factors are among those that shape the historical context and social atmosphere within which our work proceeded. In implicit and explicit ways, they not only influenced the content and tone of our investigation, but also the responses of the lawyers who participated in it. Members of the legal profession are currently grappling with the import and consequences of their profoundly altered work conditions. Thus, it is not surprising that the language they used in our conversations to discuss conduct and misconduct was often contradictory and ambiguous. The "rhetoric of ethics" used by the lawyers with whom we spoke forms the basis of this paper. It includes the terminology and vocabulary they used to express themselves, as well as discourse; what was voiced directly and indirectly, implicitly and explicitly, consciously and unconsciously. The rhetoric, which is more than the sum total of the words used, is a significant part of the establishment and maintenance of the culture of law in general, and the culture of litigation in particular.

This project provided an unusual opportunity to work with and learn from several groups of "insiders"—defense lawyers, plaintiffs' attorneys, in-house counsel, and judges. Taken together, they form a microcosm of the social system of litigation. Concerned with prob-

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lematic behavior, this inquiry has been focused on defense litigators¹ of both partner and associate status, working in large law firms in various parts of the country. This analysis focuses mainly on defense lawyers.

While our inquiry afforded a close-up view of problems confronting large-firm litigators, it did not shed much light on the dramatic kinds of ethical violations in large firms that prompted this investigation. In fact, the discussions did not yield much more knowledge or insight, in that regard, than what could have been obtained by a careful reading of national newspapers and periodicals during the past two years. Our inability to get at these types of "headline-grabbing" transgressions might be attributed to the particular methodology we employed or to the informal proscription against divulging professional confidences. In any event, only rarely did anyone in our primary study group—defense lawyers—break their silence. Moreover, when they did, there was only the faintest admission that such violations existed in their firms, with even fewer details about the transgressions themselves. These occasional disclosures, however, provided an opportunity to look at the motivations and disincentives for such actions and the ineffectiveness of social controls on them.

In the final analysis, our sociological conversations with lawyers and judges perhaps revealed something more valuable: the everyday, routine, ethical questions and dilemmas that litigators confront were ones that stimulated more animated discussion. It is precisely because of their routine nature and their common experience that lawyers were able to articulate them so well. This rare look into the "everyday ethics" of litigation provided a first glimpse of the normative ethical structure in which litigators work, permitting greater insight into the cracks in the ethical structure that allow "horror stories" to occur. Moreover, the tendency of lawyers to cast ethical issues as pragmatic problems suggests that "ethical pragmatism" is a behavioral and interpretive rule of thumb—the everyday response to problems of everyday ethics.

Finally, the most significant themes to emerge were ambivalence, contradiction, and ambiguity within litigators and groups of litigators. At the most general level, the rhetoric of judges and lawyers revealed a tension, if not an outright division, in their interpretation of the mission of the American legal system. This translated into a conflict between the rule of law and the culture of law. Lawyers expressed an acute ambivalence about both the formal organizations in which they work and the organization of the work itself. This motif—ambiguity, contradiction, and ambivalence—was a recurrent theme throughout

1. When the term "litigators" is used without qualification, it refers to defendants' lawyers, plaintiffs' lawyers, and in-house counsel.

the rhetoric of the lawyers and judges who participated in this undertaking and in my interpretive reflections on them.

During these meetings we listened to an account of perceptions that may reflect an ideal type reality for defense litigators. With the exception of the few individual defense-firm partners and associates interviewed, there was no systematic observation of lawyers' behavior, nor any in-depth, personal, face-to-face interviews to complement the analysis of group rhetoric. Because of these attributes of our investigation, it is unclear whether our insights capture phenomena and themes common to the field of litigation in particular, or more specifically among litigators within large, elite law firms, located primarily in cities in which our work was conducted. Furthermore, many of the issues currently facing the legal profession, as seen by the litigators and judges in our groups, mirror some larger patterns of social change that are occurring in other professions and in American society at large. This overall view was not one that the defense litigators were spontaneously inclined to take, a point central to this analysis that is discussed below in more detail.

This essay begins with some insights into the patterned speech that defense lawyers used to talk about ethics and professional behavior. It then moves on to a description of the organizing principle of "ethical pragmatism" on which litigators base decisions about their conduct. It would appear from the testimony given by the participants in our study that litigators consistently apply a framework of pragmatism to everyday ethical questions in ways that raise doubts about the ability of professional controls to eliminate gross ethical violations. The routine, if not daily, encounters with situations that raise questions of "everyday ethics" for both partners and associates is key to this analysis, not only because of the intentional and inadvertent testimony defense lawyers gave to such matters, but also because of the preliminary sketch it draws of everyday deviance in the firm and of the ethical structures on which the legal profession, and the firms within it, rest. The culture of the firm is the more immediate and concrete context in which the behavior in question occurs and which galvanizes its members to behave in certain ways. The way in which lawyers discuss the culture of their firms and its meaning will also be discussed. Lastly, this essay deals with the conceptual themes of ambivalence and contradiction.

I. THE LANGUAGE OF ETHICS

The field notes are filled with quotes and excerpts of what was said by lawyers who participated in these discussions.² As I analyzed the

2. Quotations of statements by study participants are taken from the author's notes or from the transcripts of the study's structured group discussions. The transcripts, which are confidential to protect the identities of study participants, are on file

language with which they addressed issues “beyond the rules,” I noted how their language was framed and in what context particular vocabulary was used. What was said and what was not said were equally important sets of data that we took away from our meetings. Like all language, the language litigators used both creates and reflects a social reality. In addition, it was an important window through which we were able to view aspects of their social world.

As a non-lawyer, I was particularly struck by certain common characteristics of the language with which litigators—defense attorneys in particular—discussed ethics and relevant behavior. Specifically, I refer to their comfort in referring to “rules” and “norms,” their caution, wariness, and marked uneasiness when using the term “ethics,” and their avoidance of language that they considered too philosophical or too spiritual, that referred to morals or morality, or that invoked values or beliefs. Even the cardinal principles of Anglo-American analytic philosophy, such as autonomy, beneficence, non-maleficence, justice, equity, and fairness—which one would suppose to be highly compatible with the logico-rational, positivistic, utilitarian attributes of the American legal system and legal thinking—were eschewed.

I was also struck by their conspicuous failure to use concepts like “misconduct” to apply to behavior that violates rules, norms, or values—as members of the scientific community do—or to invoke the sociological term “deviance.” And yet, while there was a noticeable parsimony and reductionism of their ethical vocabulary in these foregoing respects, I was also struck by the array of shared images and metaphors that they brought to bear on their discussion of ethical issues. Some of these images and metaphors, as indicated, were euphemistic, inexplicit, and even ambiguous, such as terms like “gray areas” and “incivility.” They used soft, polite, rather amorphous language that tended to neglect a multiplicity of undifferentiated, “unpacked” and largely undiscussed phenomena. In sharp contrast, other images and metaphors were coarse enough to border on obscenity. Most notable among these were references to “assholes” and “junk-yard” or “attack dogs.” These comments were made all the more unexpected to the non-lawyers among us by the fact that defense lawyers identified “incivility” and “rudeness” as what they considered to be some of the most offensive behavior in which overly aggressive litigators in large firms engage. Also noticeable was that our subjects used urbane vocabulary to describe the categories of violations (such as “incivility” or “gray areas”) but very colorful, scatological terms to describe the individual violator.

Finally, there was a propensity among defense litigators to use the language of the marketplace in lieu of that of ethics, morality, and

with Professor Robert Nelson of the American Bar Foundation. For a brief description of the study, see Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *Fordham L. Rev.* 837, 838-42 (1998).

moral judgments. For example, one participant asked whether a "market for moral correctness" or for being an ethical lawyer existed. Another referred to his firm's ethics committee as the "no business committee."³

These socio-linguistic attributes of the discourse of the lawyers who participated in our discussions and interviews gave us telling glimpses into the professional world they inhabit, including the attitudes, norms, values, and beliefs that structure and regulate it. Some of the sources of these speech patterns seem to be: (1) the powerful professionalization process that lawyers undergo during their law school education and training; (2) the "parsing of language" that lawyers are taught to practice in the substantive work of the law, which carries over into the parsing of their ethical language; (3) the linguistic ritualization of their collective expression of shared tensions and anxieties; and (4) the degree to which some of their aversions—such as increasingly uncivil behavior and the encroachment of a "bottom-line," efficiency-oriented business mentality—have inadvertently infiltrated their language.

II. THE CONCEPT AND PRACTICE OF ETHICAL PRAGMATISM

An operating principle that seemed to run through these characteristics of defense lawyers' language was a case-dependent kind of "ethical pragmatism" which, the data suggest, is embedded in the system of law and is practiced both by individual lawyers and by firms. Through their distinctive language and their direct testimony, defense lawyers made it unmistakably clear that they believed lawyers should deal with rule-circumscribed ethics, but not morality. Lawyers, they declared, are "not hired to give moral advice." This is the domain of priests, they either implied or stated openly. Cleaving to the distinction that they drew between ethics and morality, they stated that from the inception of their law school training, they were taught to divorce themselves from "moral judgment," which as one partner emphatically stated, "is not part of our paradigm." It is a "neutral other" who judges clients, they insisted, and that neutral other is integral to the process and outcome of the adversarial system.

In light of the foregoing, it is significant that in the argot of law firms, the person who heads the ethics committee, or who informally develops a reputation for dealing with legal ethical issues, is referred to as a "rabbi figure" or "ethics guru." Such terms are patently ambivalent—respectful, and humorously disdainful at the same time in spite of their structured avoidance of introducing anything too close to religion into the law.

3. It is interesting to note that in-house counsel, in contrast, used the language of management and productivity more often, which included terms and phrases such as "efficiency" and "cost-effectiveness."

If it is true that lawyers are explicitly taught and socialized to sharply distinguish "rules" from "morality," it is not surprising that we had difficulty getting them to discuss ethical matters in a way that went "beyond the rules." The fact that they linked cordoning off their role from "morality" with the concept of the "neutral other," which was associated with the foundational premises of the adversarial system, contributed to their forceful commitment to draw a line between ethics and morals in their mutual conception of appropriate professional behavior. "The fundamental problem of beyond ethics," one partner reasoned, "is that the justice system was not established for moral judgment. It is (intended) to establish facts and apply the law to the facts. The system is not set up to answer moral questions . . ."⁴

As the preceding discussion implies, it was the perception of these lawyers that the amoral nature of the law not only exempts them—collectively and individually—from dealing with issues "beyond the ethics" of rule-circumscribed behavior, but requires them to do so. That, it seems, is an institutionalized form of ethical pragmatism that has its origins in the structure of the legal system itself, or the perception of it.

It should come as no surprise, then, that ethical pragmatism enters into the calculus of ethical conduct and decision-making of individual lawyers. "Assuming that our conduct should go beyond minimally prescribed behavior," one partner asked, "who is served and who wants it changed?" Both in the private context of personal interviews and in the public forum of group meetings, the rhetoric of defense lawyers suggested a readiness to recast ethical dilemmas into practical—and more psychologically and socially manageable—considerations. For instance, with respect to coaching witnesses, one partner maintained that "it is important to remove as much doubt as you can [including] what the case is about [and] the contentions of the other party . . . to make sure that the witness understands the theory of the case on both sides." What he termed "the incidental psychological effect" of hearing the defense's position, in his mind, was not a question of ethics. For him, it was simply an unintended consequence of a pragmatic action.

Similarly, another partner admitted that behavior on the part of a client or colleague that he privately considers unethical, he would publicly refer to as "counterproductive." Converting an ethical issue into a practical problem in this instrumentally expedient way is something that "lawyers . . . do all the time," he claimed, "especially with clients." And the partner, who had acknowledged the presence of a "market for moral correctness," argued that "only at a time of an expanding legal marketplace [is there] an obligation to counsel clients

4. Despite these strong statements, a small minority of defense lawyers said that moral discussions are "required" in certain situations and implied that they can be brought into the profession through planned change.

on moral grounds.” That statement suggests that, for some, extenuating circumstances such as fluctuations in the business cycle guide their behavior. Finally, the words of another partner reflect his simultaneous uneasiness in addressing moral questions and his ease in invoking the exemptions that, he believes, the rules permit:

I advise a client to stop making a product because it is defective But, the client says [to me] ‘we’re making money . . . we’ll stop it in three years.’ In this room [referring to the room in which our project meetings were being held], it’s a moral dilemma. But, morals is a murky place to be Under the rules of ethics, it doesn’t raise a problem.

If, as these comments suggest, the pragmatic approach to questions of ethics is embedded in the law, we should observe it not only among defense lawyers, but among litigators in other venues of practice as well. And, in fact, we did. The rhetoric of in-house counsel suggests that they have their own version of ethical pragmatism. In some sense, pragmatism takes an even more concrete form when practiced by in-house counsel, as the following comments illustrate:

I’m pragmatic Am I really going to win? What is the judge going to do? If I lose, I’ll get hit big time in the press. If the judge says “it’s not admissible”, I can say “the judge said I didn’t have to do it [produce the document].” I have something to hang my hat on.

One in-house lawyer illustrated ethical pragmatism by posing the following questions: “Can you tell your mother? Can you afford to see your name in the paper?” The underlying notion was that “you can’t afford to have your reputation harmed.”

Not only do lawyers individually engage in ethically pragmatic behavior, but firms do as well. Instances of questionable ethical conduct reported in the firm are not compiled, analyzed, or reported to other members of the firm in any systematic way. This has the appearance of structured avoidance of potentially disruptive feedback into the social system of the firm. It was surprising to me that the information is not catalogued and transmitted in any organized way. The assumption, then, seems to be that the information is either irrelevant or too relevant to a stable pattern of functioning of the firm.

The practice of ethical pragmatism at the firm level was also suggested in the remarks of an associate who observed that the most recently minted class of partners in his firm “ranged from the junk yard dog . . . to mild-mannered, smart, creative people.” It was his view that the “firm needs a collection of personalities” because “some cases call for the junk-yard dogs.” The positive function he imputed to the “junk-yard dog” is tied to an economic climate in which inter-firm competition for clients has become routine. By retaining a sprinkling

of "hardball" litigators on its roster, a firm need not relinquish to a competitor "hardball" clients who demand "hardball" litigation.

As these examples suggest, this type of dubious conduct in the service of practical goals is clearly tolerated by the firm. How this happens is an intriguing question. The imbalance between the utility of such behavior for the firm on the one hand, and its negative impact on the other, causes uncertainty about both the firm's and the profession's collective response to such behavior. The issue of distinguishing degrees of violations remains as well: whether "venial sins . . . that carry a five-yard penalty," are disregarded.

III. "HIDE THE BALL": THE EVERYDAY BEHAVIOR OF DISCOVERY

Defense lawyers agreed that one of the most frequently occurring forms of problematic, rule-violating behavior entails excessively aggressive, "hardball" actions on behalf of a client. This kind of overly-zealous behavior, which was alternatively described as "gladiatorial," "Rambo-type," or "scorched-earth" in its approach, is used with the goal of "winning" the case and "defeating" the adversary. Hyper-conformity to adversarial principles, by pushing beyond a level of aggressiveness that is not only tolerated, but considered both mandatory and admirable, is a classical form of lawyerly deviance. It is notable and not surprising, however, that defense lawyers never used the term "deviant" to apply to such behavior. Instead they described it in the kinds of metaphorical terms cited earlier, referring to it equivocally as "pushing the envelope," or "crossing the line," or sweeping it into the more euphemistic and encompassing term, "incivility." When referring, however, to such hyper-aggressive rule-defying action by individual lawyers, they used the labels of "assholes" and "junk-yard dogs." Although this language carries connotations of strong disapproval, its sting was dulled by the standardized, emotionless way that it was verbalized by both partners and associates.

Generally, defense lawyers acknowledged that such behavior occurs even in the best firms, but only rarely, and certainly not in their own firms. Misconduct, they contended, can be traced to a "few bad apples" in the profession whose behavior can be explained, for the most part, by individual "personality" characteristics, aggravated by the pressures of the external environment. In fact, defense attorneys did not specifically identify "ethics" as one of the most critical problems facing the future of law firms. That is not to say that the concern was dismissed. But, as one partner asserted, "I don't think ethical issues are at the top" of the problem list.

Defense lawyers tended to discuss and define ethics from a "situational" standpoint, wherein each case is incidental and disconnected from other behavior within the individual, the firm, or the profession: "[W]e work within . . . the ethics of a particular situation," one partner

stated. Because there was never any explicit definition of what litigators meant by the term "situational ethics" or any "thick descriptions" of "situations" from which its meaning could be derived, it is difficult to know what kinds of conduct the term encompasses. But what we do know from the discussion surrounding it, both endorsement and silence, is that most defense lawyers implicitly acknowledge its existence, although they gave no insight into the form(s) it takes.

The most descriptive and strongest statements that were obtained from the partners about their "first hand" experiences or observations of unethical behavior were very weak. They tended to speak in the most general and diffuse way about such behavior, and they were unable or unwilling to add any sociological detail to it. There was a marked uneasiness even among those who voiced the most benign and general admissions or acknowledgments of what they had witnessed. For example, one partner noted that he does not know any lawyers who are "continuously unethical." This observation was shared by a colleague who claimed that he has not witnessed "flat out unethical behavior." Both statements, however, gave the impression that these lawyers may have occasionally witnessed "situationally" unethical behavior among their colleagues.

Young lawyers entering a firm are better able to act as "observing participants" in their firm than are the partners who are deeply rooted in it, and therefore, take it for granted. Some of the most striking sets of observations by the associates about the environment of the large, elite law firms in which they are working and undergoing post-law-school training were the generational differences between older and younger partners in their outlook and actions. It is the younger partners, they said, who tend to be the most aggressive in the discovery process, and who are the most prone to engage in the calculated withholding of documents and in fierce discovery fights.

Associates did not attribute the differences in outlook and behavior to age per se. Rather, they linked them to historical changes that had taken place in the legal profession. In this regard, they cited the fact that many senior partners had been in practice before the discovery rules were written, and before there was such intense emphasis on "billable hours." They also contended that the older partners had spent more time in court and were consequently more cognizant of the kind of integrity one is obliged to display before the judge. The associates testified that they were under much greater pressure from younger partners to behave in an "attack dog" manner. This suggests that the ethical, mentoring-relevant culture internal to large law firms is far from uniform. It is important, too, that in our separate sessions with partners, they showed no awareness that associates perceived such a gap between the older and younger partners, or any insight into the impact that the disparities between them might have on the ethical

messages and training that associates are and are not receiving in large law firms.

It is unclear why there is such a disparity between older and younger partners. After one partner reluctantly admitted that there were "a few people at my firm" who engaged in questionable conduct, several others conceded that their firms also harbored partners of that ilk. The little we learned about who these people are in a sociological sense, or what behaviors earned them that reputation, lent support to the observations of the associates. For example, the "hardball types" were male litigators, ranging in age from mid-thirties to early forties, and were not among the most senior people in the firm. They were described as "obnoxious in depositions" and "unusually obnoxious to opposing counsel," who are known, particularly by associates and paralegals in the firm, to be "difficult to work with." The data also show that other partners in that firm "tend not to know" about the behavior in question since there is relatively little substantive contact among partners.

If the perceptions of the plaintiffs' bar, in-house counsel, and judges are to be believed, discovery misconduct is more abusive and more frequent than defense lawyers admit. From the standpoint of a small minority in each group, who spoke passionately, the culture of litigation has sunk to a state of total normlessness. One in-house lawyer stated that:

Lawyers use any tactics available to make it tougher for the other side [even] if it means being devious, tricking, or ignoring . . . the code of ethics . . . and cutting corners In-house counsel hires outside counsel [and] if outside counsel finds lesser potential impact of the problem . . . in-house counsel will put [ethical violations] under the tablecloth.

Similarly, a plaintiffs' lawyer opined that: "[T]he inherent dishonesty of the system has become institutionalized to the extent that it is invulnerable. How many clients will you have if your reputation is honest and forthright . . . ? If it weren't for lying and cheating, you wouldn't have much litigation" Additionally, a judge said that: "Everybody knows the rules [Lawyers ask], 'What can I get away with within the rules?' I think that's the mindset."

The fact that this radical view exists illustrates the range of perception about abuse in discovery. Together, the above statements mark the theoretical negative end of the continuum of perception, demonstrating that this extreme view has permeated every segment of the defense litigator's professional network.

Judges agreed that defense lawyers "churn the case" and that the pressure on them to accumulate billable hours has become an institutionalized incentive for abuse. In addition, it is the experience of in-house counsel that defense lawyers do withhold documents, and that, within the defense team formed by inside and outside counsel, it is the

in-house counsel who are more apt to produce documents and avoid fierce discovery fights. The following examples of responses from in-house counsel illustrate this sentiment:

[C]orporate counsel try to do the right thing but outside counsel show us how good they are by withholding documents

[O]n a general basis, outside counsel tends to be less willing to disclose than we are.

[W]hen the question has come up, we will produce more than outside counsel suggests If it's a gray area, produce it. That's my default option.

One might expect that the greatest contrast in perception and observation of misconduct in discovery would be expressed by members of the plaintiffs' bar, and, not surprisingly, that was the case. But the wide distribution of their perceptions, which ranged from trust to mistrust in the social relations of the legal system, was striking. The endpoints of that range—positive and negative—are captured in the remarks of two plaintiffs' lawyers. One remarked that "from the plaintiffs' point of view, I don't know what they [defense counsel] have. There is an element of trust involved." By contrast, another plaintiffs' lawyer candidly stated: "We don't believe defense lawyers are destroying documents all the time, but we see it often enough that we have to be wary"

Between these extremes, there were almost as many different perceptions and observations of problems in the discovery process as there were lawyers voicing them, as the following exchange among four plaintiffs' attorneys illustrates.

I see stonewalling but not deliberate lying on the part of defense lawyers And, it's not always defense lawyers

There is a good deal of lying

You see the standard responses from certain defense firms . . . which may not be quite lying but is dancing around with the truth. They call it zealous advocacy.

I call it bullshit.

Apart from an assessment of defense counsel's conduct in discovery, our conversation with the plaintiffs' bar provided us a revealing glimpse into their own role in discovery, and what of their own behavior they consider to be "outrageous." Interestingly, compared to defense lawyers, plaintiffs' counsel were more inclined to admit to problems in their ranks. One attorney starkly volunteered that "there is unethical and even criminal behavior among plaintiffs' lawyers," and in a critical, almost mocking tone, alluded to the bar's ability to locate "a witness for every accident." "We're not always right," this attorney added. Others raised the specter that "outrageous" behavior on the part of the plaintiffs bar is part of everyday practice.

[W]e bring in other firms to spread the risk. [There is] the question of structuring the case . . . who's going to run it . . . and each case makes its own politicians By bringing in other firms, we act as a large law firm because we assign tasks. We file in different jurisdictions It's done all the time. I'm a lawyer first and a businessman second. But, sometimes, I put on my business hat first We spread the risk . . . and reduce competition. We have our cake and eat it, too.

Discovery behavior on both sides of the litigation aisle takes a patterned form. Even the language used to describe it alludes to a common metaphor of "game playing" in which explicit reference to combat is often made, as the description of litigation by a plaintiffs' attorney made clear: "You fight, fight, and fight some more, and then you settle The defense's main weapon is to withhold as much as you can. The plaintiff's weapon is to file as many motions as you can"

Hiding documents "has gotten worse not better," a plaintiffs' lawyer claimed. "In big stakes litigation . . . with a potential exposure to a large class of clients, you hide the ball" And, the "discovery game has to do with generating fees," a member of the in-house counsel group confidently affirmed. With a note of irony in his delivery, a plaintiffs' attorney implied that the game itself elicits a level of competitiveness, sometimes bordering on unprofessional conduct that might spill over into unethical behavior: "Litigation is a game . . . a funny game. And, when someone hurts you, you react badly."

The rhetoric of judges also portrays discovery within litigation as a game of chance, referred to by many of them as "hiding the pea." "Defense lawyers engage in hide-the-ball tactics . . . to obfuscate and mislead," a federal judge declared, while a federal magistrate found the "gamesmanship attributable to discovery . . . perplexing" and worried that it might be "firm taught."

IV. "EVERYDAY ETHICS" IN THE LIFE OF THE DEFENSE LITIGATOR

If transgressions in the discovery process are routine—as all groups other than defense lawyers maintained—"hiding the ball" is a problem of everyday ethics. Beyond the ethics of discovery behavior, however, there is a host of important ethical phenomena associated with the ordinary, routine work of lawyering about which defense litigators spoke more freely and in greater detail. They were inclined to view these ethically relevant issues and actions as complicated, everyday matters, calling for discernment and judgment because they are not always covered by a specific rule. Although these issues were not specifically defined as "ethical," they clearly involved professional choices. The kinds of questions they identified in this connection concerned conflict of interest, billing, duplication of work, the definition

of the client, and the nature of the lawyer-client relationship among others. The specific examples they designated and discussed notwithstanding, there was a strikingly inclusive and protean quality to all that were encompassed under the rubric of "grey areas."

Restructuring of organizations has become an everyday occurrence in American society that raises "everyday" questions of ethics for defense firms. The question of "who is the client?"—the corporation, the CEO, or the general counsel—and the problem it poses, came up in the partners' group in a somewhat disguised form, in response to our queries about counseling clients. The structure of corporations and their legal departments has changed, creating a new and larger set of statuses and roles in defining the client, and constructing an effective relationship in which ethical discussions can take place. Some stated that the reluctance of defense lawyers to engage in such discussions is related to the fact that they are currently less likely to deal with the general counsel or senior management than they were in the past. In addition, there is the perception that corporate clients tend to view them simply as "hired guns" and that the "investment in relationship" that was a hallmark of the corporation's longstanding alliance with a particular defense firm and its lawyers is a thing of the past. The tone of their speech betrayed their dismay about the changed relationship and their view that they have become a sort of commodity. Excerpts from the fieldnotes on in-house counsel lend support to that perception:

I am *using* them as litigators not as counselors They are hired guns to produce results for the company

[I] suspect that there are senior partners in the firm who are sad and resentful [because of] their diminished access to senior executives We [referring to prior experience as defense counsel] used to run right over or around the in-house counsel It's an ego thing There's more cache dealing with senior executives [and] the whole role of counseling has changed. More counseling is in-house. I use the outside counselor to advise me.

A routine issue that also emerged in the partners' group was the way in which legitimate behavior or tactics are used by lawyers in the service of illegitimate ends, nudging them ever "close[r] to the line." "It's interesting," mused one partner, "what you can do under the guise of clarification Do you mean this, or that . . . ?" In assessing "how close to the line" lawyers come "when conferring with witnesses during depositions or breaks," another admitted that there is a "tension" in the approach-avoidance behavior that lawyers must practice with respect to the ethical line. Such conflicts cannot, however, be resolved by "staying six feet behind" it either. These remarks suggest that the fear of being too far behind the line is greater than being too close to it.

Billing is an essential, universal, but ordinary task of the large law firm. Yet, despite its "everyday" nature, decisions surrounding it are sometimes complicated, particularly for associates. Given a quarter-hour minimum billing unit, one young lawyer rhetorically asked, "Do you bill a quarter hour for a two minute [telephone] call?" Another associate volunteered that, when recording billable work, he takes the client's resources into consideration, and by doing so, covertly gives "quasi pro bono" time in certain situations: "I look at [who] the client [is] . . . I don't write it down because if I do, I know the client will get billed."

Associates are also surprised—in an ethical sense—by what one young attorney called the "redundancy" of large law firms. "Reinventing the wheel," he told us, "bothers clients and bothers you [the attorney]," referring to the situation in which the firm is "duplicating research for the same client."

Associates, as a group, concurred that, by and large, they do not have access to a "mentoring" relationship with a partner, nor do they have the possibility of being mentored through long-term, continuing relationships with clients. Taken together, their remarks suggest the "ethics of mentoring" may be a routine problem confronting law firms in the 1990s. Some of them appealed for the development of mentoring relationships that would include within their parameters the ethical orientation of associates when they are first engaged by a firm and "ongoing guidance" and "clarification" with regard to ethical issues. Such clarification is needed, they said, in defining the scope of the discovery process in which they should engage, in deciding how forthcoming they should be in turning over documents, and in discerning to what extent, in what ways, and under what circumstances it is licit to engage in "hide-the-ball" tactics. To wit, one young lawyer rhetorically asked: "[W]hat are the wrongful . . . [and] unethical aspects of aggressive behavior?" Still another argued that firms should "create a culture" in which "people raise ethical questions," and in which "good lawyer[s]" engage partners about such issues.

There are instances when associates do confer with partners on matters of ethics; however, some portrayed partners as unreceptive to such ethical consultation and even reprimanding or penalizing in their response. For example, one of the associates said that he was told on his evaluation that he was "argumentative" because he had "raised an objection to an ethical problem with a partner" on two occasions. That experience, he said, taught him "not to work with that particular partner," but it is not unreasonable to assume that he also received a powerful message about raising ethical objections. Another alleged that "there are a large number of partners who don't want your opinion and . . . that's not an atmosphere that's conducive to anything." Regardless of who initiates the ethical discussion between a partner

and an associate, when such interaction occurs, it allows the senior and junior lawyer to “flesh it out . . . and come to a resolution.”

Along with this implosion of interpersonal dialogue and communication, there has been an explosion of electronic forms of communication within the law firm, the larger economy, and in other spheres of society. A fragmentary but interesting set of data from the project concerned the outpouring of documents and information that has resulted from new forms of technological innovation that have become standard in large law firms. Contributing to the eruption of the paper avalanche is the unrelenting need to document almost everything in life, either as a result of our evermore litigious society or as a cause of it. Technology and the information it spawns have created another area in which “everyday” ethical questions are raised. Additionally, the amount of information that lawyers are saddled with is likely to grow in the future, suggesting an unavoidable expansion of the scope of ethically relevant questions. In this project, we concentrated our efforts on the discovery process, where the amount of paper involved is enormous. As the quantity of available information grows exponentially, the question of how lawyers should deal with and respond to both the amount of paper itself and the information it contains becomes a “gray” area.

Much of the information originates from outside the firm, thereby imposing an external agenda on the individual lawyer that jeopardizes professional autonomy. In addition, the instant communication and access that new technology makes possible has implications for the changing nature of the lawyer-client relationship. It decreases the social distance between the lawyer and the client, upsetting the traditional imbalance of power between them. In a personal communication from one defense partner, which supported a point he had made at one of our meetings, he said that his office e-mail “inbox” contained 180 messages and his “out-box” showed that he had sent 131 messages to others during the same seven-day period. The sheer amount of time that is needed to deal with such forms of electronic information impinges upon personal control over professional time. The lawyer is also forced to assess the degree of professional risk that comes about if information is ignored. At the organizational level, the onslaught of information increases the need for new forms of bureaucracy in which documents are classified, filed, stored, retrieved, and made accessible. Finally, a critical issue exists concerning decisions involving the destruction of documents and records.

This post-modernistic development presents the legal profession with a host of new challenges in the area of routine, everyday lawyering. The information explosion adds another dimension to the host of competencies that lawyers must bring to their work. Besides legal expertise, humane comportment, communication and presentation skills,

the lawyer of the 1990s is expected to have technological literacy and the ability to gather, analyze, and respond to electronic information.

The organization of everyday work in today's law firm raises serious questions of ethical behavior which are probably more important to address than those that are theatrically reported in the press. The larger set of subtle, conservative data that can be obtained from an examination of ordinary ethical issues will provide stronger, more nuanced, and convincing analysis of the ethical scaffolding on which the legal profession rests. We do have bits of data that, when pieced together, begin to form a picture of what lawyers view as normative with respect to the ethics of everyday practice. "I think defense lawyers do pretty much what they're supposed to do," a member of the plaintiffs' bar told us. "I have high regard for the people who defend against me," she said admiringly. Others agreed with that statement. One plaintiffs' lawyer commented that: "Obfuscation and throwing you off the track happens all the time. That's what defense lawyers are supposed to do"

There were also snippets of data from in-house counsel that provided clues about the profile of the underlying ethical structure of litigation. A lawyer for a pharmaceutical firm told us that if he had received the proverbial smoking gun document the night before trial, he would not produce it if he had objected to doing so at an earlier point in the discovery process. He did admit, however, that he would "worry about the next case." Counsel for a consumer-lending company agreed. His comments reflected both his commitment to the adversarial process and his comfort with the structure of rules: "I would agree . . . if you accept the premise that litigation is an adversarial system, that if I legitimately raised objections, I don't have to wave it [the smoking gun] in the plaintiff's face."

The notion of everyday ethics and its relevance to understanding the structure of the legal profession's ethical system should be explored in much greater depth than this project allowed. It is difficult to comprehend and define the extraordinary violations without understanding the ordinary ethical issues that practicing lawyers routinely confront and resolve in their everyday professional life. Focusing on the tail of the distribution of ethical conduct tells us little (as the use and misuse of horror stories starkly demonstrates) about the dominant value system that informs everyday conduct. Some issues under the theme of everyday ethics that might be fruitful lines of inquiry include: the definition, categorization, and analysis of the ordinary issues that pose problems for lawyers, and how they are resolved; the identification of the structural and cultural reasons why common ethical dilemmas have received so little attention; and the extent to which incompetence exists and is defined as an everyday ethical matter.

If there was a shared theme that could be identified in our meetings with various groups of litigators and judges (apart from their call for

the judiciary to take a more active role in discovery), it was the allegation that there are too many incompetent lawyers. The "sloppy representation" that they equate with incompetence is socially manifested and observable, whether it is intentional or not. As one state court judge plainly stated: "[I]ncapable people are becoming lawyers [There are] absolutely plain, stupid, incapable people out there In the state court system, it's true on both sides [—defense and plaintiff]. I wouldn't hire them as paralegals or secretaries, let alone as lawyers!"

His assessment drew agreement from a federal district court judge, who suggested that "undergraduates [at a small, elite college] can run circles around nine out of ten lawyers who appear before us There is incompetence on both sides They can't write a brief."

Implicit in the comments of the in-house lawyers, too, was the charge that the incompetent lawyer is not a rare phenomenon. In-house counsel repeatedly responded to hypothetical questions that we posed about the appropriate behavior of counsel by insisting that they do not want to do the work of plaintiffs' counsel. And plaintiffs' lawyers were quick to admit that within their ranks there are those "who are not fit—temperamentally, financially, or experientially—to see a case through."

This global perception of incompetence may reflect a generational bias and may not be reflective of objective differences in competency at all. A profession's older guard rarely believes the newer crop is as well trained as they were. If incompetence does exist to any significant degree, however, and that has yet to be demonstrated, the issue is definitely an "everyday" ethical matter. The preoccupation with incompetence, it seems, is related to what many referred to as "the size of the bar," which both litigators and judges cited time and again as a problem.

Although this project was spawned by the "going public" of "big" ethical violations within "white-shoe firms" and the profession's concern about that fact, a narrow focus on the big issues limits our understanding of why and how such extreme violations occur by those whose professional mission is to safeguard the public trust. Focusing on extreme behavior isolates the violations from their systemic connection to the normative ethical structure. By emphasizing individual characteristics, such an approach is likely to encourage a "few bad apples" theory of deviance. In the end, the act of counting or quantifying the instances of "crossing the line" has the effect of minimizing the significance of misconduct.

V. THE "AMORPHOUS" CULTURE OF THE FIRM

The "culture of the firm" is a phrase that was used freely by the defense lawyers. Despite the ease and frequency with which it was

cited, however, their notion of "culture" and its applicability to law firms was free-floating and amorphous rather than precise. There appeared to be some agreement in both the partner and associate groups that there is such a thing as a "large firm culture" in which "quality work gets done." But even in this case participants were not able to identify the constituent components of such a quality-conducive firm culture. In part, this was connected to their marked ambivalence about whether or not "firms matter" with regard to the control they exert on the professional behavior of their members. Some asserted that their firms had strong cultures, with effective social controls to foster and maintain decently high standards of conduct. Others alleged that both the large firms' culture and their capacity to exemplify and regulate ethical lawyering have been weakened by the firms' size and scale, their greater internal heterogeneity, and their increasing decentralization.

It is interesting to note that those who took a more critical stance regarding the culture of law firms invariably referred to firms other than their own. Additionally, there were those who contended that even if the overall culture of the large law firm was not as unifying and compelling as one might ideally hope, its various departments and the practice teams that formed within them have strong, ethically influential subcultures that can also serve as "safe harbors" where ethical discussions can take place without the usual constraints.

In spite of all their talk about "culture," most defense lawyers maintained the position that lawyering still remains an essentially individual, professional activity whose underlying dynamic derives from the fact that clients hire a lawyer—not a firm—and that lawyers should, and do, function with a considerable amount of professional autonomy. The statements of in-house counsel were generally in agreement. "I hire individuals, not firms," one inside counsel stated. Others concurred. One noted that "we focus on lawyers more than firms. He [the individual lawyer] has my loyalty, not his firm. It's someone you develop a relationship with . . ." Another agreed, stating: "It's a relationship of trust and confidence in the individual [lawyer] at the bottom line."

Regardless of where they stood on the "weak-to-strong" culture spectrum, most defense partners seemed convinced that the introduction of "laterals" constitutes a threat to a firm's cultural cohesion. They were particularly critical of the way in which these outsiders, especially if recruited for their "business book" and "rainmaker" abilities, could introduce marginal conduct into the culture of the firm they joined. The implicit assumption was that the firms to which they personally belonged were inherently "pure," and that the "laterals," who were immigrant-like strangers, brought with them "dangerous" and "foreign" elements that could "pollute" the "purity" of the culture of the firm they were entering. This assumption is the American social

organizational equivalent of anthropologist Mary Douglas's renowned concept of "ritual purity."⁵ This perspective on laterals reflects the anxiety-accompanied difficulties that lawyers are having in adjusting to certain changes confronting large law firms—notably, the greater inter-firm mobility of lawyers, the increasing social and cultural diversity of their composition, and the intensification of business and economic pressures on them.

In addition, a more generalized tendency to attribute ethically problematic actions to forces outside of one's self or one's own firm was present in defense litigators' depiction of contaminating laterals. Some were also inclined to impute a certain amount of the hyper-aggressive behavior in which litigators sometimes engage to the expectations and demands of individual and corporate clients. These clients were depicted as taking the initiative in ways that impel lawyers to engage in "pushing the envelope"—"hardball" behavior bordering on rule violation.

Judges tended to support the contention that clients demand overly aggressive lawyers. In fact, the rhetoric of some judges depicted the clients of the 1990s as ethically bankrupt, and no objection was raised to that characterization. "Clients will go to someone who will . . . cheat, lie, withhold, steal, and win," one state judge flatly asserted. It was the view of a federal district judge, and what appeared to be a strongly held one, that "clients are worse than the lawyers they hire" with regard to upholding standards of conduct. A colleague on the federal bench placed part of the blame for discovery abuse squarely on the shoulders of clients:

[N]o one is looking for a reasonable defense lawyer The client asks for the toughest, scorched earth, take no prisoners defense attorney, who, [as a result,] is not just running the meter but [is concerned with a particular self-presentation]: I'm going to show them what a macho guy I am

As might be expected, the in-house counsel with whom we spoke dismissed that portrayal of themselves and the corporations they represent. A small minority implied, but never explicitly stated, that they wanted a "zealous advocate" who teeters on the line. What they wanted, they claimed, was a pragmatist, not a firebrand, a lawyer with a feeling for the nuances of a situation who would serve the pragmatic goals of the corporation.

One attorney who eschewed the "zealous advocate" model explained: "What we want is effectiveness with an eye toward the nature of their [defense counsel's] reputation in the community . . . who act with respect toward human beings in public If I saw him screaming and berating . . . opposing counsel . . . I would fire him."

5. For a discussion of the concept of "ritual purity," see Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* 7-28 (1980).

Others agreed: "The asshole lawyer is more expensive. If I'm \$25,000 over budget because of motions to compel . . . I'm in trouble." The goal is "to effectively and efficiently get the results for the company . . . and [uncivil] lawyers don't serve that goal."

VI. THE UNEASY COUPLING OF CORPORATE AND PROFESSIONAL CULTURE

The infiltration of the ethos and practice of business into the structure of the firm and the organization of its work was viewed by defense litigators as one of the most critical issues facing the future of the profession. Their grudging resignation to increased "corporatization" is complicated by their staunch belief that law remains a profession with a culture of its own. On the one hand, they expressed regret that law had become a business; on the other, they declared that "unless it is run like [one], it will disappear." Nevertheless, they unwaveringly insisted that law continues to be a profession with its own unique culture that, they implied, was nobler than the culture of business. Using rhetoric that was split between coarse and lofty language, one partner expressed this internally inconsistent perspective by declaring that law is "a shitty business but a wonderful profession . . . [and that] is the challenge before us."

The kinds of cultural contradictions and strains that this partner invoked, and that many others echoed, is part of a larger pattern of cultural tensions on the American scene. The "merger fever" in the American economy that has reached a high pitch in the 1990s has brought with it the necessity to blend the cultures of organizations that are often historically antithetical to each other. A notable example is the case in which a corporation acquired a second medical school.⁶ As that merger unfolds, one of the chief obstacles to full integration has been the meshing of the corporate and academic cultures, in addition to the blending of the distinctive academic cultures of the two schools. Just as the university faculty, in that case, resisted relinquishing some of its prerogatives and traditional modes of governance, which are part of its professional heritage, the comments of defense lawyers—particularly partners—indicated reluctance to let go of the most highly prized elements of their historical culture.

Although defense litigators talked with a great deal of passion about transformations in the legal profession, their disquietude about the inroads made by business into the organization of their work is not a revelation. That impression can be gleaned from a daily reading of newspapers.⁷ Therefore, although that motif arose in our conversa-

6. See Gilbert M. Gaul, *The New Prescription for Health Care: Hahnemann Merger Dwarfs—and Frightens—Many Local Rivals*, Phil. Inquirer, Nov. 21, 1993, at E-1.

7. See, e.g., Nina Bernstein, *Battles Over Lawyer Advertising Divide the Bar*, N.Y. Times, July 17, 1997, at A1 (describing the legal profession's struggle to control lawyer

tions, the commercialism of the law is not a unique finding of our work. Perhaps what is most important to note about the discussion of "the business versus the professional pull," as one partner put it, is the severe psychological conflict, role ambiguity, and role pressure that individual practitioners are experiencing, and the consequent social anxiety that the profession is undergoing. The contradiction that has its roots in the melding of the legal and business cultures is an indicator of the ambivalence in the social and cultural system, rather than the individual personality.

One of the consequences of this cultural ambivalence is the lack of a regulated, normative process for socializing new lawyers into the cultures of the firm and the profession. Partners as well as associates agreed that there are currently important deficiencies in how the training and socialization of young lawyers within a large firm take place. The intellectual, technical, attitudinal, and ethical learning that associates undergo was described as a process of "osmosis"—the largely unorganized, non-didactic, informal, and implicit absorption of knowledge, techniques, norms, rules, and behavioral patterns that occurs through watching partners at work and carrying out assignments under their aegis. This suggests that what associates are absorbing through "osmosis" are patterns of behavior and attitudes about which both the firm and the profession are ambivalent—in a cultural sense.

Defense litigators' conceptualization of the change in their profession, which is almost exclusively focused on accommodating the ethos of business in the professional culture, is too narrow. There is no doubt that this is central, and perhaps primary. It seems, however, that there is also another phenomenon operating here, one that is related both to the ambiguity which was palpable in these discussions, and to Durkheim's concept of anomie.⁸ There is the possibility that so much social and cultural change has taken place, within both the American profession of law and the society in which it is embedded, that lawyers have difficulty defining exactly what is happening to the profession and to themselves. Under these circumstances, they have a somewhat over-determined and over-simplified tendency to define the problem as business versus profession, and also to define a cluster of disparate factors as ethical. In this latter regard, it became quite clear that they by no means had consensus about what should be called an ethical problem—except perhaps for the partly implicit way in which

advertising, which many view as harmful to lawyers' public image); Alan Finder, *Now, Continuing Education for Lawyers: Mandating Classes in Subjects Like Ethics and Office Management*, N.Y. Times, Sept. 17, 1998, at B3 (describing the mandatory institution of courses that are designed, in part, to teach lawyers the skill of "managing a law office"); Dean Starkman, *Can a Law Firm Be Its Partner's Keeper?*, Wall. St. J., Jan. 1, 1997, at B1 (observing that the rapid growth of law firms has created a difficulty of "keep[ing] tabs" on the unethical conduct of individual partners).

8. For a discussion of the concept of "anomie," see Emile Durkheim, *The Division of Labor in Society* 353-73 (George Simpson trans., The Free Press 1st ed. 1964).

they came to focus on "grey areas" of "everyday ethics." The sociologist Joseph Gusfield lays out a framework for considering the cultural and societal process by which certain problems come to be defined and framed as "public."⁹ As that analytic framework indicates, exclusive attention to the coupling of the cultures of business and profession is a truncated interpretive paradigm for diagnosing and defining social problems within the law profession or the American society in which it functions.

VII. THE ELITISM OF LARGE FIRMS

According to the study participants, many of the firms had some mechanism in place to handle questions of ethics or professional dilemmas when they arise. It appeared, however, that information regarding the nature of the problems or questions, and how they are resolved was rarely, if ever, fed back into the firm. Both associates and partners seemed unaware of the extent of reported (or unreported) problems, questions, or violations of ethical standards. By and large, it was simply assumed that the existence of a structure within the firm is synonymous with the absence or resolution of problems. Consequently, it is difficult for "organizational learning" to take place. Lack of feedback curtails the opportunity of the firm and its members to learn to define and deal systematically with problematic behavior that occasionally occurs even in the best "family." Secrets are part of every group culture—family or organization—and we have no reason to believe that the firms represented in our project are an exception. The onus of exposing "family secrets" even within the "family" might threaten the cohesion of the firm, diminish its perceived competitive edge in the legal community, or give credence to the public's low image of the legal profession. These factors, along with others, might account for what appeared to be the blanket of silence that firms impose on questions of ethical conduct.

The "not-at-our-firm" mentality, which was present at each of our conferences with defense lawyers, and which became more explicit as the project evolved, may partially explain the lack of feedback. Many of the statements of defense litigators revealed a certain smugness about the superiority of the ethical standards of large firms, relative to those of solo practitioners, small firms, and the plaintiffs' bar. The same tone of ethical preeminence was present in the remarks that our participants made about the standards of the firms—large or small—from which the "laterals" in their own firms were recruited.

The comments of partners and associates suggested that something akin to an "ethical stratification system" existed in their minds, in which firms were ranked by size and type, by variables which were

9. See Joseph R. Gusfield, *The Culture of Public Problems: Drinking-Driving and the Symbolic Order* 4-9 (1981).

assumed to be associated with the quality of work their members produce, the standards of ethical conduct they maintain, and the civility of their professional behavior.

"We are well-mannered, generally, in big firms," said one partner, referring to the civility of lawyers in large firms, although the same partner was uncertain whether large firm lawyers are "more honest, or less honest than . . . [lawyers in] firms who are less favored." "People come to us because of our integrity," another partner offered. And a third stated that: "[T]hose firms who can afford [ethical training] do it It is the large firms that can keep their finger in the dike. They can afford to send people to seminars to be better people. It still is [an] economic [issue]." In addition to the reductionism in this line of reasoning, it implies that firms with fewer economic resources have fewer ethical resources as well.

Alongside partners' conviction that large law firms generally ranked higher in ethicality than smaller ones were the parallel, unexamined suppositions of the associates. One ventured that "spin-offs . . . from large firms" create a "reputation for hardball" in order "to attract clients." Another stated that: "[W]e believe incivility [exists] in small firms, but that is not to say that there aren't problems in our firms In big firms you . . . learn the profession from the bottom up . . . [which is not the case] in small firms." There are "structures in place" with rules about "acceptable and unacceptable behavior . . . that you wouldn't get . . . if you were working alone or in a smaller firm," an associate volunteered, supporting the general view that "unethical behavior at large firms is an aberration."

VIII. AMBIVALENCE, CONTRADICTION, AND AMBIGUITY

Over the course of our work, striking patterns of contradiction arose in the observations and opinions that lawyers and judges brought to the table. What emerged as the strongest, most undisputed set of meta-concepts was their expressed convictions about what they regarded as "the mission" of the American legal system, and the principle of advocacy on which it is erected. Under this system, there is a lack of consensus on what the law, and the assembly of actors within it, is supposed to be directed toward. Litigators affirmed that clients, who would otherwise be defenseless, have the right to protection under the law. It is the lawyer's supreme imperative to faithfully and ardently represent the client and to disclose the client's confidence at his peril. The ideology of the adversarial process and defense lawyers' hyper-extended preoccupation with it was forcefully expressed again and again. "This is an adversarial system," one litigator declared. "That's what it's all about." The adversarial process is the "Big Good," they claimed, because the confrontation between the two sides results in resolution.

The aggressive style of litigators, which was strenuously defended by some, likely grows out of their dedication to the adversarial system. The tradition of that kind of conduct is supported by the belief that it is necessary for promotion (“to please your boss”) in a culture that suggests that “aggressive litigators are good litigators,” and also by “hardball clients” who have come to expect “hardball” representation.

In contrast, judges’ vision of the legal system places “Truth” with a capital “T” as the end-goal, elusive as that might be. There is a deep divide between litigators who practice law and the judges who interpret it about what constitutes the “Big Good” in the legal system, and the judges we met with seemed keenly aware of the disparity. “Our interest is very different than the lawyers,” one judge emphatically stated. “Ours is to get at the truth.” The discovery rules were written “to facilitate the truth-seeking process,” a federal judge stated with exasperation as he recalled the “furor” that arose in litigation circles around Rule 26 of the Federal Rules of Civil Procedure.¹⁰ “It seems a simple proposition . . . [to] tell everything to everybody as soon as you can.” But a colleague on that bench, recognizing the inherent contradiction in how lawyers and judges view the function of the law, responded that “the criticism of Rule 26 was that the adversary process was compromised . . . telling the other party to disgorge everything.” Yet another judge agreed. Recalling an earlier stage of her career as a large firm litigator, she acknowledged: “I never learned or believed that my role [as a defense litigator] was to find the truth and to provide complete disclosure” And she admitted that when she left private practice she “rationalized” that behavior.

What becomes clear in juxtaposing litigators’ emphasis on process and judges’ emphasis on rules is the inherent conflict between the culture of litigation and the rules of civil procedure. Rules are a part of culture, but they are not the only element, and in the case of litigation, the tension between the part and the whole has become the norm. The simply stated, but potent, rhetorical question of one plaintiffs’ attorney captured the essence of the contradiction between the culture and the rule of law when he asked: “Do we expect [to have] an adversarial process with a clean fist fight?”

The particular group of professionals who were the focus of this inquiry—large-defense-firm litigators—viewed themselves as “reactive” in their orientation to and relationship with constituents and reference groups, both within the profession and outside it (that is, senior members of the firm, judges, clients, and members of the public). At the same time, however, they strongly adhered to the notions of “individual accountability” and “individual responsibility,” concepts which

10. Rule 26 provides for “complete and correct” disclosure in discovery, and takes several steps to ensure this, including mandatory initial disclosures, with or without request, mandatory disclosure of all expert witness testimony, and pretrial disclosure of all evidence to be used at trial. *See* Fed. R. Civ. P. 26.

suggested that, paradoxically, they defined themselves as “proactive” and autonomous.

Regardless of their relative standing vis-à-vis other occupations, these lawyers saw an erosion of their independence, control, and power brought about, in part, by their changed relationship with the client. As one attorney remarked, the client is “a more sophisticated purchaser of legal services [and] is driven by costs and economics,” who insists on being “more participatory,” often forcing the lawyer to “respond to client’s expectations, in some instances [with] explicit ‘Rambo-type’ conduct,” and who sends the attorney “mixed messages,” demanding a “Cadillac defense” with a conflicting command not to include “associates on every case.”

These attorneys also attributed the erosion to the changing relationship between the legal profession and the American public, which “has a skewed perception about what we do,” whose “perception is the driving force behind tort reform,” and whose view affects “who goes into the profession in the first place.” The lawyers’ reactivity to negative public perception and their simultaneous resignation to it were highlighted by the comments of some who ranked “educating the public” as a primary “issue facing the future of law firms,” and by others who regretted the public’s disapproval but believe “as litigators we can’t change it.” The contradiction, then, arises from the fact that defense lawyers claimed to be reactive and vulnerable to the pressures imposed by these social groups, while in their proactive, individual orientation, they came close to denying their influence on professional conduct.

The data show that this type of paradoxical thinking, which ran through many of our discussions, led to certain forms of paradoxical behavior. While defense litigators regret the way that incivility has crept into the profession, they also contribute to it. This was exemplified by their use, in a casual, unconscious way, of uncivil slang terms to label the colleagues of whom they disapprove. In addition, while they bemoan the presence of the “junk-yard dog” in their ranks, they are ambivalent about ridding the profession of such lawyers, and the behavior they personify. For example, some asserted that firms need “junk-yard dogs” for certain cases, especially in helping them compete for and handle the cases of “hardball” clients. One partner went so far as to say that “to the extent that people are unethical, it gives me an advantage.”

Even at the organizational level of the firm, this kind of contradictory thinking was apparent. Although a significant proportion of defense partners contended that “firms don’t matter” and raised doubts about the existence of a unified firm culture, they were, nonetheless, willing to entrust to their firms the critical responsibility of choosing the right associates to affiliate with the firm, who in turn must choose

the proper role models, despite the absence of any systematic mentoring. Additionally, they trusted their firms to handle ethical violations.

Finally, partners in large firms showed a strong simultaneous tendency to externalize the site and the source of ethical transgressions, and to internalize the changing conditions of the legal profession that contribute to these transgressions. To the extent that they externalized problems, they did so by acknowledging that rule-violating or ethically questionable behavior does occur in the profession, but not within the firms with which they are affiliated. To the extent that they internalized problems, they did so by taking a particularistic analytic view, in which many of the issues confronting the legal profession were seen as exclusive to the profession itself rather than characteristic of professions more generally or of changes in the wider society.

As stated earlier, the rules of civil procedure are part of the culture of law, and not vice versa. Accordingly, it is reasonable to assume that culture will prevail over rules, particularly when rules have no sanctions attached to them, or if they do, when sanctions are not systematically applied. "Asshole" behavior works more often than not because "the system is such that they can operate and not be called on the carpet," one defense partner charged. If there was a single point on which litigators and judges agreed, it was the judiciary's passive role in discovery and the need for their active involvement in it. While the "the lack of judicial oversight" was offered as a partial explanation for the excesses and abuses in discovery behavior, litigators and judges view the underlying reasons for that judicial stance somewhat differently.

In-house counsel cited what they perceived to be judges' ignorance of the economics of litigation, on the one hand, and their concern with political survival, on the other, as explanations for the lack of judicial involvement. One insider commented that: "[J]udges have no incentive to change the system They have no sense of the cost of litigation . . . and no business sense. Lawyers [(outside counsel)] and judges will never change the system." Another agreed, adding that "judges won't slap serious sanctions on plaintiffs' lawyers who made contributions."

Plaintiffs' attorneys were even more adamant about the need for judicial intervention, with more consensus in their reasoning about why it rarely occurs. Time—or, more precisely, the lack of it—is what accounts for judges' detachment from discovery in the eyes of plaintiffs' attorneys. A plaintiffs' lawyer stated that: "Courts have to take a tougher stand on the motion to compel. [It is] viewed as 'sit down and work this out! Don't waste our time.' The defense counsel have no incentive The game can continue—to hide the documents" A colleague added: "It's a bench problem Judges have to take responsibility. Magistrates are overworked and overloaded."

Judges, at least those with whom we spoke, did not challenge the assertion made by litigators that “judges hate discovery.” In fact, some not only conceded the point that discovery is a “nuisance,” but also openly assumed some responsibility for the problems in the very process they complained about: “Our court system plays into it because discovery is not something any of us want to be involved in.”

There was some support for the notion that the impersonal, remote, “objective” nature of paper litigating—which has become so prevalent—encourages abuse in discovery, while the personal, proximal, and “subjective” presence, not only of the judge but of opposing counsel in courtroom litigation, tends to reduce it. The effect of what one justice termed “corporeal presence” goes a long way, he claimed, toward “solving discovery and ethical problems.” “It’s probably tougher to look your opponent in the eye in court,” he speculated. Another judge, who does “hearings at . . . [her] desk,” agreed. A similar point was made both by plaintiffs’ and in-house counsel.

“When you are in the room . . . judges are more apt to make people give information than when it is a paper trail,” a plaintiffs’ attorney said. The in-house lawyer explained: “I ask [myself]: ‘Do I have a legitimate objection to make?’ I don’t regard it as hiding If I’m called on it by opposing counsel or *The Wall Street Journal*, can I go before the judge with a straight face and say it was too burdensome or unreasonably related to the subject matter?”

In this regard it is important to note that associates in large firms have little exposure to the courtroom, trial work, or interaction with judges for which many of them are eager. In our conversations with associates, they alluded to a narrow cross-section of the firm’s work and activities in which they are actively involved, or even get a chance to observe passively.

The bench agreed that the imposition of sanctions is a relatively rare occurrence. From its point of view, the judiciary’s general reserve stems from political, structural, and temporal realities. The overriding factor, however, is a structural one. It is not simply the presence of a violation that determines whether or not sanctions are imposed. For example, the issue of reappointment figured prominently in the mind of one state judge who frankly admitted: “I would be less willing to sanction than a federal district judge. We move with more trepidation. If I sanction, the next time I’m up for appointment, the . . . County Bar Association will say I’m not qualified.”

A federal district court judge explained that the “pressures of the docket” often play a major role in the decision. “If we had a little more time, it would help,” he stated. “Sanctions take a lot of extra work,” and the “eighteen other cases waiting” often impact the decision. A colleague on the state bench agreed that time is a critical factor. “Even with modern discovery ideas, we operate in a medieval system,” as if the court were dealing “with eight cases per year.” “If

we had eight cases," he added, "we could deal with discovery" Summing up that exchange, one judge concluded: "The rules assume we have all the time in the world."

But the structural reasons for judicial behavior seem to be the most compelling. Why sanctions are not imposed more frequently is related to the structure of the court system itself and to the structure of litigation within it. With regard to the former, two state judges complained that the structure of the appellate system undermines the authority of the lower court, stripping it of its judicial potency in the area of sanctions.

One judge noted that "[i]n state court, if we sanction, on review we're almost certain to get reversed . . . if you can't show three or four or five reasons for failure to comply The court doesn't have the strength it should have and doesn't get the support on review." A colleague on the bench added that: "The perception is . . . that the appellate court is not supportive when it comes to sanctions We are not in a strong position There's not much comfort that you will be supported by the appellate court."

The rhetoric of another, who described "constraints on the judiciary," suggested that the structure of litigation, and the "game playing" that is viewed as a normative part of it, discourages meting out sanctions:

Unless it is a legitimate issue of privilege . . . our response is to stop playing the game If we impose sanctions, you have litigation within litigation We can spend time on it . . . and how have we advanced the case? If we award sanctions . . . we are saying 'keep this game going.'

Our role and goal are different than the lawyers. We function in an adversarial system but we don't participate in it.

IX. AN INSIDE OUTLOOK: DEFENSE LAWYERS REFLECT ON THEIR PROFESSION

The near-sighted and local perspective that defense lawyers had on the radical changes that have occurred in the legal profession was striking. While defense lawyers were adept at identifying, and, to a lesser extent, analyzing some of the major problems confronting their profession, they did not connect the structural and functional changes in the organization and practice of law with those that are occurring in other segments of society. Their self-reflections were narrowly focused on their own profession, failing to lead them to consider similar phenomena and patterns that bear upon other professions and facets of American life in the 1990s.

I was impressed, however, by the striking parallels between the ethical and the more-than-ethical phenomena, problems, and questions with which the American legal profession—in its litigation and large

law firm sectors—is struggling, and those which are manifest in other occupational, professional, and institutional arenas of the society. Notable in this regard are the lack of mentors and mentoring in undergraduate and graduate universities, medical schools, and residency milieux,¹¹ the eruption of concern about increased incivility in American politics,¹² media,¹³ business,¹⁴ and professional sports,¹⁵ the preoccupation with misconduct in science,¹⁶ the mounting concern about both the oversupply of physicians¹⁷ and medical malpractice,¹⁸ the shifting structure and meaning of the patient-doctor relationship with the advent of managed care,¹⁹ and the superficial use of the concept of “culture” in the business world, especially in situations where mergers have taken place.²⁰

Particularly when compared to the profession of medicine and the health care industry, the parallels with the legal profession and the climate of legal practice are worth noting. Escalating health care costs, in large part, have driven reform in the organization and deliv-

11. See Judith P. Swazey & Melissa S. Anderson, *Ass'n of Acad. Health Centers, Mentors, Advisors, and Role Models in Graduate and Professional Education* 23 (1996).

12. See Matt Schudel, *Nasty as We Wanna Be; It's My World So Get Out of My Way: Has Mean-Spirited Selfishness Taken Hold of Our Culture?*, Orlando Sentinel, May 10, 1998, at 6; see also Susan Eastman, *Politics Decorum in Short Supply Lately*, St. Petersburg Times, Jan. 18, 1998, at 6 (commenting on the increased infighting in politics, both at the local and national level); Kate Folmar, *10 Council Candidates Spar in Thousand Oaks Forum*, L.A. Times, Sept. 18, 1998, at B4 (noting the “incivility” that permeates city politics).

13. See David Zurawik, *Rudeness is Big Thing on Small Screen*, Baltimore Sun, Dec. 7, 1997, at 1E.

14. See Martha Waggoner, *Rudeness at Work a Growing Problem: Ignoring Bullies Can Drive Good Employees Away*, Detroit News, June 17, 1998, at B4.

15. See E. Digby Baltzell, *Sporting Gentlemen: Men's Tennis from the Age of Honor to the Cult of the Superstar* 339-79 (1995).

16. See Daniel J. Kevles, *The Baltimore Case: A Trial of Politics, Science and Character* (1998).

17. See Eli Ginzberg, *The Future Supply of Physicians*, 71 Acad. Med. 1147-53 (1996); Marc L. Rivo & David A. Kindig, *A Report Card on the Physician Work Force in the United States*, 334 New Eng. J. Med. 892-95 (1996).

18. See, e.g., Josh Meyer, *County Supervisors Vow to Examine Medical Malpractice Cases*, L.A. Times, Aug. 28, 1998, at B3 (commenting on a number of impending medical malpractice suits threatening Los Angeles county).

19. See David Tarrant, *Some Doctors and Patients Question What Managed Care Has Done to Their Relationship*, Dallas Morning News, Nov. 3, 1997, at 1C.

20. See, e.g., Anne Faircloth, *Confederates Take Fifth Avenue*, Fortune, Oct. 12, 1998, at 152, 152-56 (describing the culture clash that has occurred following the purchase of Saks Fifth Avenue by Proffitt's, a Southern retail company); Hal Lancaster, *Hiring a Full Staff May Be the Next Fad in Management*, Wall St. J., Apr. 28, 1998, at B1 (commenting that companies are “extolling the importance of human beings”); Elizabeth MacDonald, *Ernst Blamed for Collapse of Merger*, Wall St. J., Feb. 17, 1998, at A3 (noting that a merger was scuttled due to “problems combining the cultures of the two firms”); Jagdish N. Sheth & Ranjendra Sisodia, *Manager's Journal: Only the Big Three Will Thrive*, Wall St. J., May 11, 1998, at A22 (stating that in the merger between Daimler-Benz and Chrysler, there will be “challenges in meshing the two different cultures”).

ery of medical care, which, in turn, has dramatically altered the professional roles, identities, and practice settings of physicians. The strategy of both large not-for-profit health care systems and giant for-profit entities to acquire physician practices has brought doctors face-to-face with the difficult and unsettling task of blending a corporate ethos with a professional one. Shifts in the organization of health care and its providers, while not specifically intended to do so, are encroaching on the autonomy of physicians. The status of a wide range of medical specialties, once prized in the American medical care system and in the public eye, is dwindling. These trends—which in many respects mirror those we heard in our group discussions—suggest that the identified patterns are not confined to the legal profession, but related to more macro-social and cultural forces at work in American society.

Also intriguing was the lack of attention paid by the legal profession to the “everyday” ethical issues that lawyers confront—a tendency that has been present in the fields of medicine and bioethics as well. That is, there has been an inclination on the part of bioethicists to concentrate on the “big” life-and-death issues, and to underestimate, if not overlook, the “lived,” “everyday” ethical dilemmas that arise in the practice of medicine. “Everyday ethics” have to do with the implementation of values on role and normative levels, and for that reason the absence of interest in them is puzzling, particularly in a professional milieu.

Questions regarding the ethical behavior of litigators fit into an array of larger societal and cultural happenings in our country that have taken the form of an “ethics explosion.” As noted by a Protestant theologian, the “ethicization of everything” has brought about the development of an “Ethics Industry.”²¹ In banking and on Wall Street, in journalism and in government, in medicine and in religion, reports on professionals who have come close to the line or crossed over it have become daily fare in the electronic and print media. For example, in recent months the “ethics” of journalists, physicians, lawyers, and government officials at the highest levels, as well as at the universities and bar associations, have been called into question and have received prominent coverage in national newspapers.²² The public nature of ethical questions and breaches of ethical standards both reflect and shape the public’s perception of professionals in general rather than lawyers in particular.

The ethical lapses of professionals, who are held to a higher standard of ethical behavior because they have been granted the privilege

21. James M. Gustafson, *Ethics: An American Growth Industry*, Key Rep., Spring 1991, at 1, 1.

22. The concepts of “assisted suicide” and “cloning” have received major attention in the scientific community, in the courts, and in the popular press and are among the foremost bioethical phenomena in the collective mind.

of self-regulation, create considerable uneasiness both inside and outside the profession. The license to self-regulate is partially responsible for the positive social stereotyping of the professions, and infractions by a few are sufficient to jeopardize that standing. In addition, there is a bifurcation in the professions' relationship to societal values: at the same time that they are responsible for furthering, safeguarding, and interpreting values, the professions are also involved in changing them. One of the major points that sociologist Talcott Parsons emphasized with respect to the legal profession was the special relationship it has to important values in the society and its "vie serieuse" (religious) dimensions.²³

Within their parochial professional reflections, defense lawyers did not refer to more pervasive forces at work in society. As noted earlier, they tended to project blame for the changes occurring in the profession on "outsiders" in an almost tribal and quite fundamentalist manner. The prototype of this was their attitude toward the way that "laterals" pollute the purity of the firm into which they come.

The phenomenon of the lateral, however, is not exclusive to the legal profession. Its equivalent in large academic health centers is the "research star," who is actively recruited by research universities—often with the help of headhunters—to add value to the research enterprise. The greater competition between academic health centers for patients, clinical and research revenues is, in part, responsible for the move of research stars from one university to another. Like the lateral in the large law firm, the new recruit brings a star-quality reputation, and often a set of funded, cutting edge research projects, that attract more of the ever-shrinking but highly coveted federal research dollars available to universities. And where recruitment of "research stars" is occurring in university settings, conflict and competition has developed between the standing faculty and the stars. This, it seems, mirrors almost precisely what is occurring in large law firms that recruit laterals.

CONCLUSION

The inherent way in which defense lawyers viewed the issues confronting them and their firms, as well as the ambivalence, contradiction, and ambiguity that pervaded their outlook on the profession and their discourse on it, seem to be indicative of the uncertainty and perplexity they are experiencing in the face of ramifying professional and societal change. What should be emphasized is not only the acute ambivalence of their rhetoric, but also its passion, which signifies a type of social anxiety. This form of ambivalence is not primarily a matter of

23. Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *Essays in Sociological Theory* 370, 370-85 (1954).

the psychological makeup of individual lawyers. Rather, it is a shared social phenomenon.²⁴

Despite the overwhelming agreement that “financial pressures” have spawned a sense of “insecurity” and have “diminished the quality of our lives,” defense lawyers did not spontaneously acknowledge the danger that the stresses and strains of economic constraints can pose for an otherwise stable pattern of ethical conduct. At the same time, there was recognition that economics has a bearing on ethical behavior. This was illustrated by one partner who declared that “only at a time of an expanding legal marketplace [is there] an obligation to counsel clients on moral grounds,” and another who asserted that only those firms who can afford ethical training are likely to do it. The ethical pragmatism reflected in these views suggests that the profession should devote itself to “preserving ethics” at the same time that it considers ways to go “beyond” them.

Our intent and attempt to discuss ethics “beyond the rules” notwithstanding, the participants in this project were ambivalent about doing so, preferring to ground the discussion within the rules rather than beyond them. In the workshops we conducted with defense lawyers, an attempt was made to elicit “horror stories” about gross violations of ethical behavior.²⁵ That approach did not turn out to be fruitful for a number of reasons. First, if radical misconduct were as common as that approach suggests, the profession would be in a state of anarchy. That being the case, this project would have never been conceived. In addition, despite the fact that tales of horror were nonexistent in the groups we observed, we know that such cases exist. In fact, throughout this undertaking, articles were distributed to us in which the legal troubles of lawyers in prominent defense firms who “crossed the line” were featured—casting in relief the “not-at-our-firm” response of defense litigators that we heard in our discussions. Moreover, some of the current and most public cases of lawyer misconduct that have been front page material for national news publications found their way into our discussions. The critical question, then, is not whether such cases exist or even how many. The reductionistic, mechanical, and positivistic counting of gross violations provides no

24. This is related to the concept of sociological ambivalence which was first developed by Robert K. Merton and Elinor Barber. See Robert K. Merton & Elinor Barber, *Sociological Ambivalence*, in *Sociological Ambivalence and Other Essays* 3, 3-31 (Robert K. Merton, ed., 1976).

25. Unlike the resident physicians in Charles Bosk's study of the professional socialization of surgeons for managing medical errors and failures, see Charles L. Bosk, *Forgive and Remember: Managing Medical Failure* (1979), defense lawyers did not seem to regard such stories as “moral parables,” as ways of voicing their disapproval of certain forms of behavior, as a means to express and relieve anxiety and tension, or as a mode of social control. Rather, they tended to minimize both their authenticity and significance, and also to deny the applicability of the kinds of incidents and actions portrayed by the stories to their own firms and experiences within them.

insight about the social and cultural processes that allow such violations to occur, and to “go public.”

It is also naive to expect that lawyers will discuss gross ethical violations in the kind of semi-public forum in which our workshops were held. Beyond the issue of individual risk—confidentiality agreements notwithstanding—there is the onus of exposing “firm secrets,” violating the informal, but powerful, taboo against such disclosures, and the problems that inevitably arise when someone takes on the role of “whistleblower.” In addition, as noted earlier, there was an allusion to the tactical advantage for the defense attorney that unethical conduct on the part of opposing counsel can provide. It accrues, they contended, in both equal and unequal status relationships. Since it is believed that a “younger lawyer . . . is easily intimidated,” an experienced attorney may use “asshole” behavior as leverage. Likewise, a colleague was explicit in her contention that she does not “perceive ethics as a problem,” and in a relationship of equals, “to the extent that people are unethical, it gives me an advantage.”

Our work was focused on analyzing accounts of behavior in the discovery process, and thus, the meat of our data was not the behavior itself but the rhetoric used to describe it. From our very first encounter with defense lawyers, what was conspicuous and notable was the dualism of their speech. This was reflected in the contradictory perspectives they voiced about everyday behavior in the discovery process, and in litigation more generally. They openly discussed what they viewed as routine, ordinary behavior that frequently raises routine questions of ethics.

What I found both noteworthy and surprising was that defense attorneys acknowledged everyday ethical challenges, expressed some concern about them, and reported them as a continuous occurrence, but were inattentive to their cumulative significance. Their comments created the impression that, somehow, because of their daily occurrence, they were not important enough to command their attention or that of the profession. “Horror stories” in social organizations grow cumulatively out of small deviations in behavior among members. To the extent that everyday violations, such as those “venial sins” that one partner alluded to, are overlooked for whatever reason, we should expect to be horrified at some stage in the life of an organization—law firm or otherwise.

Notes & Observations